

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, ex rel. Erie
Insurance Property & Casualty Company,

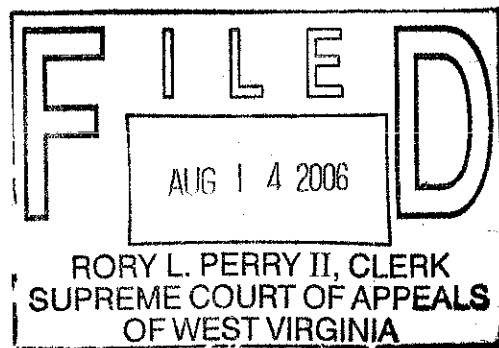
Petitioner/Defendant Below,

Docket No.:

vs.

The Honorable James P. Mazzone, Judge
for the Circuit Court of Ohio County and
Elizabeth Murfitt,

Respondents.



**ERIE INSURANCE PROPERTY & CASUALTY COMPANY'S VERIFIED PETITION
FOR WRIT OF PROHIBITION**

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner, Erie Insurance Property & Casualty Company, Petitions this Court pursuant to Article VII, § 3 of the Constitution of West Virginia and West Virginia Code §§ 51-1-3 and 53-1-1, *et seq.*, to issue a Writ of Prohibition against the Honorable James P. Mazzone. In support of the within Petition, Petitioner avers as follows:

I. PARTIES

- A. Petitioner, Erie Insurance Property & Casualty Company ("Erie") is a Defendant in the underlying action pending in the Circuit Court of Ohio County at Civil Action No. 02-C-43M.
- B. Respondent, The Honorable James P. Mazzone, is a Judge of the Circuit Court of Ohio County, West Virginia and entered an Order compelling the partial production of Erie's

claim file relating to Erie's investigation of a motor vehicle accident involving Erie's insured which formed the basis of the underlying third-party bad faith action. In particular, Judge Mazzone ordered the production of those portions of Erie's claim file pertaining to reserve amounts.

- C. Respondent, Elizabeth Murfitt, is a Plaintiff in the underlying action pending in the Circuit Court of Ohio County at Civil Action No. 02-C-43M.

II. ISSUE PRESENTED

Whether the Circuit Court exceeded its jurisdiction or legitimate powers by granting, in part, Plaintiff's Renewed Motion to Compel and requiring the production of those portions of the Erie claim file pertaining to reserve information in the third-party bad faith action pending in the Circuit Court of Ohio County at Civil Action No. 02-C-43M, where such reserve information constitutes non-discoverable opinion work product pursuant to W.Va. R. Civ. P. 26(b)(3)?

III. PLAIN AND CONCISE STATEMENT OF GROUNDS FOR RELIEF

- A. Plaintiff, Elizabeth Murfitt, initiated the underlying third-party bad faith action against Erie in relation to Erie's handling of a claim arising out of a motor vehicle accident involving Murfitt and Erie's insured, Edward Lai.
- B. Within the context of the underlying third-party bad faith action, Plaintiff served a Request for Production of Documents upon Erie, seeking a complete, unredacted copy of the Erie claim file relative to the motor vehicle accident claim.
- C. Erie produced a redacted version of its entire claim file and provided a detailed privilege log identifying the specific documents withheld or redacted and setting forth the basis for each redaction or withheld document pursuant to the attorney-client privilege and/or the

work product doctrine. A true and correct copy of Erie's privilege log is attached to the Addendum at Exhibit B.

- D. Erie objected to, *inter alia*, the disclosure of the reserve information contained in the claim file on the basis that such information constituted opinion work product. (See Exh. A.)
- E. On February 24, 2004, Plaintiff filed a Motion to Compel, seeking an order requiring Erie to produce a complete, unredacted copy of the claim file, including the disclosure of the reserve information contained therein.
- F. In considering Plaintiff's Motion to Compel, the trial court conducted an *in camera* review of the documents at issue by reference to each asserted objection and specifically examined those documents within the claim file pertaining to reserves which Erie identified as opinion work product.
- G. After completing the *in camera* review of the documents, examining Erie's privilege log and hearing oral argument, the trial court issued an Order relative to Plaintiff's Motion to Compel on March 30, 2005. (See Exh. B.)
- H. The trial court's Order provided that certain documents were not subject to disclosure, ordered other documents to be produced in their entirety and identified other documents to be produced as redacted by Erie. (Id.)
- I. With respect to those documents to be produced in their entirety or in redacted version, however, the trial court ordered that any information contained in such documents pertaining to reserves be disclosed. (Id.)

- J. In relation to the trial court's March 30, 2005 Order compelling the disclosure of Erie's reserve information, Erie filed a Petition for Writ of Prohibition seeking to prohibit the trial court from enforcing its Order.
- K. In granting Erie's Writ of Prohibition on November 30, 2005, this Court held that the trial court was required to make a preliminary determination on the threshold issue of relevancy under W. Va. R. Civ. P. 26(b)(1). State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 625 S.E.2d 355, 358 (W.Va. 2005).
- L. On December 6, 2005, Chief Justice Davis filed a Concurring Opinion regarding this Court's granting of Erie's Writ of Prohibition and observed that "the cases discussing requests to produce reserve information do so in the context of the opinion work product doctrine." Id. at 361-62.
- M. In addressing the applicability of the opinion work product doctrine to reserve information under Rule 26(b)(3), Chief Justice Davis identified the two leading cases of Simon v. GD Searle & Co., 816 F.2d 397 (8th Cir. 1997) and Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 139 F.R.D. 609 (E.D. Pa. 1991). Id. at 364.
- N. Chief Justice Davis' Concurring Opinion sets forth a detailed analysis concerning the views taken by Simon and Rhone-Poulenc with respect to the protection afforded to reserve information compiled by non-lawyers and found that the proper focus for reconciling these positions in this regard turns on whether the reserve information is generated in anticipation of litigation. Id. at 364-65.

- O. Chief Justice Davis concluded that if reserve information is established in anticipation of specific litigation, the Rhone-Poulenc approach protects the information from disclosure pursuant to the application of the opinion work product rule. Id. at 365.
- P. After this Court granted Erie's Writ of Prohibition, Plaintiff filed a Renewed Motion to Compel on April 17, 2006, seeking an Order requiring Erie to produce the reserve information.
- Q. After hearing oral argument, the trial court issued a Memorandum Opinion and Order dated June 29, 2005.¹ (See Exh. C.)
- R. The trial court granted Plaintiff's Renewed Motion to Compel, finding that the reserve information is relevant and not subject to the work product privilege and ordered that the reserve information be produced. (Id.)
- S. The trial court stated that although Chief Justice Davis' Concurring Opinion provides "some preliminary thoughts on the applicability of the work product privilege," the Supreme Court of Appeals did not reach the issue of whether the work product privilege applies to the reserve information, "and thus this Court was not directed to revisit its previous determination on the issue." (Id.)
- T. The trial court further suggested that if the reserve information is protected work product, Plaintiff has a substantial need for the reserve information which may overcome the protection afforded by the work product privilege pursuant to Rule 26(b)(3). (Id.)

¹ Erie did not receive notice of the court's Memorandum Opinion and Order until July 25, 2006. Due to an administrative error, the Circuit Clerk did not provide copies of the court's Memorandum Opinion and Order upon their entry.

U. For the reasons set forth more fully in Erie's Memorandum of Law in support of its Petition for Writ of Prohibition, a Writ of Prohibition should issue on the following bases:

- Erie's reserves constitute protected opinion work product pursuant to W. Va. R. Civ. P. 26(b)(3).
- Erie's reserves are set by Erie's claims representatives and embody the mental impressions of those representatives concerning issues of coverage, liability and damages with respect to the specific claim. Erie's reserving is case specific and takes into account the specific information received concerning the individual claimant. Thus, the reserves are prepared in anticipation of specific litigation and are protected from discovery.
- Plaintiff retained an attorney shortly after the subject accident who then contacted Erie, placing Erie on notice early in the claim that litigation was reasonably foreseeable. The reserves set by Erie with respect to Plaintiff's underlying bodily injury claim were prepared in anticipation of litigation upon the notification that Plaintiff had obtained an attorney. Reserves were later set during pending litigation and after Erie had retained counsel to defend its insured.
- Plaintiff cannot demonstrate the "very rare and extraordinary circumstances" necessary to overcome the opinion work product protection afforded to the reserve information under Rule 26(b)(3).

IV. RELIEF REQUESTED

WHEREFORE, Petitioner, Erie Insurance Property & Casualty Company, respectfully requests that this Court issue a Writ of Prohibition as follows:

- A. Vacating the June 29, 2006 Order issued by the respondent judge, The Honorable James P. Mazzone, requiring Erie to disclose information pertaining to reserves.
- B. Any and all additional relief deemed just and proper.

Pursuant to West Virginia Rule of Appellate Procedure 12(a), Petitioner requests oral argument on the within Petition for Writ of Prohibition. In support of this Petition for Writ of Prohibition, Erie Insurance Property & Casualty submits the accompanying Memorandum of Law in Support of Petition for Writ of Prohibition. Finally, should this Court issue a Rule to Show Cause, a list of those persons to be served has been submitted with this Petition for Writ of Prohibition as required by West Virginia Rule of Appellate Procedure 14(a).

Respectfully submitted,

DAPPER, BALDASARE, BENSON,
BEHLING & KANE, P.C.

BY

A handwritten signature in black ink, appearing to read 'R. Behling', is written over a horizontal line. The signature is fluid and cursive.

Robert J. Behling
WV I.D. #6406

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**MEMORANDUM OF LAW IN SUPPORT OF ERIE PROPERTY & CASUALTY COMPANY'S
VERIFIED PETITION FOR WRIT OF PROHIBITION**

I. STATEMENT OF THE CASE

Plaintiff, Elizabeth Murfitt, initiated the underlying third-party bad faith action against Erie in relation to Erie's handling of a claim arising out of a motor vehicle accident involving Murfitt and Erie's insured, Edward Lai.

Within the context of the underlying third-party bad faith action, Plaintiff served a Request for Production of Documents upon Erie, seeking a complete, unredacted copy of the Erie claim file relative to the motor vehicle accident claim. Erie produced a redacted version of its entire claim file and provided a detailed privilege log identifying the specific documents withheld or redacted and setting forth the basis for each redaction or withheld document pursuant to the attorney-client privilege and/or the work product doctrine. (See Exh. A.) Erie objected to, *inter alia*, the disclosure of the reserve information contained in the claim file on the basis that such information constituted opinion work product.

On February 24, 2004, Plaintiff filed a Motion to Compel, seeking an Order requiring Erie to produce a complete, unredacted copy of the claim file, including the disclosure of the reserve information contained therein. In considering Plaintiff's Motion to Compel, the trial court conducted an *in camera* review of the documents at issue by reference to each asserted objection and specifically examined those documents within the claim file pertaining to reserves which Erie identified as opinion work product.

After completing the *in camera* review of the documents, examining Erie's privilege log and hearing oral argument, the trial court issued an Order relative to Plaintiff's Motion to Compel on March 30, 2005. (See Exh. B.) The trial court's Order provided that certain

documents were not subject to disclosure, ordered other documents to be produced in their entirety and identified other documents to be produced as redacted by Erie. (Id.) With respect to those documents to be produced in their entirety or in redacted version, however, the trial court ordered that any information contained in such documents pertaining to reserves be disclosed. (Id.)

In relation to the trial court's March 30, 2005 Order compelling the disclosure of Erie's reserve information, Erie filed a Petition for Writ of Prohibition seeking to prohibit the trial court from enforcing its Order. In granting Erie's Writ of Prohibition on November 30, 2005, this Court held that the trial court was required to make a preliminary determination on the threshold issue of relevancy under W. Va. R. Civ. P. 26(b)(1). State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 625 S.E.2d 355, 358 (W.Va. 2005).

On December 6, 2005, Chief Justice Davis filed a Concurring Opinion regarding this Court's granting of Erie's Writ of Prohibition and observed that "the cases discussing requests to produce reserve information do so in the context of the opinion work product doctrine." Id. at 361-62. In addressing the applicability of the opinion work product doctrine to reserve information under Rule 26(b)(3), Chief Justice Davis identified the two leading cases of Simon v. GD Searle & Co., 816 F.2d 397 (8th Cir. 1997) and Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 139 F.R.D. 609 (E.D. Pa. 1991). Id. at 364. Chief Justice Davis' Concurring Opinion sets forth a detailed analysis concerning the views taken by Simon and Rhone-Poulenc with respect to the protection afforded to reserve information compiled by non-lawyers and found that the proper focus for reconciling these positions in this regard turns on whether the reserve information is generated in anticipation of litigation. Id. at 364-65. Chief Justice Davis

concluded that if reserve information is established in anticipation of specific litigation, the Rhone-Poulenc approach protects the information from disclosure pursuant to the application of the opinion work product rule. Id. at 365.

After this Court granted Erie's Writ of Prohibition, Plaintiff filed a Renewed Motion to Compel on April 17, 2006, seeking an Order requiring Erie to produce the reserve information. After hearing oral argument, the trial court issued a Memorandum Opinion and Order dated June 29, 2005.² (See Exh. C.)

The trial court granted Plaintiff's Renewed Motion to Compel, finding that the reserve information is relevant and not subject to the work product privilege and ordered that the reserve information be produced. (Id.) The trial court stated that although Chief Justice Davis' Concurring Opinion provides "some preliminary thoughts on the applicability of the work product privilege," the Supreme Court of Appeals did not reach the issue of whether the work product privilege applies to the reserve information, "and thus this Court was not directed to revisit its previous determination on the issue." (Id.) The trial court further suggested that if the reserve information is protected work product, Plaintiff has a substantial need for the reserve information which may overcome the protection afforded by the work product privilege pursuant to Rule 26(b)(3). (Id.)

II. ISSUE PRESENTED

Whether the Circuit Court exceeded its jurisdiction or legitimate powers by granting, in part, Plaintiff's Renewed Motion to Compel and requiring the production of those portions of the Erie claim file pertaining to reserve information in the third-party bad faith action pending in the

² Erie did not receive notice of the court's Memorandum Opinion and Order until July 25, 2006. Due to an administrative error, the Circuit Clerk did not provide copies of the court's Memorandum Opinion and Order upon its entry.

Circuit Court of Ohio County at Civil Action No. 02-C-43M, where such reserve information constitutes non-discoverable opinion work product pursuant to W.Va. R. Civ. P. 26(b)(3)?

III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard for Writ of Prohibition.

Pursuant to W. Va. Code § 51-1-3, this Court has original jurisdiction in cases of prohibition. “The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W. Va. Code § 53-1-1. Erie respectfully submits that the Circuit Court exceeded its jurisdiction and legitimate powers when it partially granted Plaintiff’s Renewed Motion to Compel and required the production of those portions of Erie’s claim file pertaining to reserve information.

“A writ of prohibition is available to correct a clear legal error resulting from a trial court’s substantial abuse of its discretion in regard to discovery orders.” *Syl. Pt. 1 State Farm v. Stephens*, 425 S.E.2d 577 (W.Va. 1992). In addition, “when a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court’s original jurisdiction is appropriate.” *Syl. Pt. 3, State ex rel. USF&G v. Canady*, 460 S.E.2d 677 (W.Va. 1995). Further, “unless obviously correct or unreviewably discretionary,” those rulings requiring attorneys to turn over documents that are presumably prepared in anticipation of litigation or trial are presumptively erroneous. *Id.* at *Syl. Pt. 6*.

A circuit court’s ruling on discovery requests is reviewed for an abuse of discretion; but, where a circuit court’s ruling turns on a misinterpretation of the West Virginia Rules of Civil

Procedure, this Court's review is plenary. State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 583 S.E.2d 80 (W. Va. 2003). As such, "[t]he discretion that is normally given to a trial court's [procedural] decisions does not apply where the trial court makes no findings or applies the wrong legal standard [.]'" Canady, *supra*. Erie respectfully submits that based upon the principles set forth above, a Writ of Prohibition should issue in this matter.

B. Erie's Reserves Constitute Opinion Work Product.

The rule governing work product is found in W. Va. R. Civ. P. 26(b)(3) which states, in pertinent part:

Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. **In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.**

W. Va. R. Civ. P. 26(b)(3) (emphasis added).

The Supreme Court of Appeals has held that "[t]o determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation." *Syl. Pt. 7, State ex rel. United Hosp. v. Bedell*, 484 S.E.2d 199 (W.Va. 1997).

Rule 26(b)(3) makes a distinction between factual and opinion work product with regard to the level of necessity that has to be shown to obtain their discovery. *Syl. Pt. 7, In re Markle*, 328 S.E.2d 157 (W.Va. 1984). Fact work product has been defined as “the information or materials gathered or assembled by a lawyer in anticipation of litigation not falling under the category of opinion work product.” *State ex re. Chaparro v. Wilkes*, 438 S.E.2d 575 n. 1 (W.Va. 1993) (citations omitted). Opinion work product consists of “the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 583 S.E.2d 80 (W.Va. 2003). The *Medical Assurance* court explained that Rule 26(b)(3) specifically provides the documents prepared in anticipation of litigation by or for the party’s representative includes those documents prepared by a party’s insurer and thus “the purpose of Rule 26(b)(3) is to narrow the ability to obtain trial preparation material by expanding the coverage of the work product rule to include persons other than an attorney.” *Id.* (quoting *In re Markle, supra*).

The Supreme Court of Appeals has recognized that opinion work product is even more scrupulously protected than fact work product and thus “enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances.” *Bedell, supra* (citations omitted); *Mazzone*, 625 S.E.2d at 361 (Davis J., concurring).

In her Concurring Opinion regarding the Supreme Court of Appeals’ granting of Erie’s Writ of Prohibition relative to the instant matter, Chief Justice Davis observed that “[t]he cases discussing requests to produce reserve information do so in the context of the opinion work product doctrine.” *Id.* at 361-62. In addressing the issue of the application of the opinion work product doctrine to reserve information, Chief Justice Davis identified the two leading cases of

Simon v. GD Searle & Co., 816 F.2d 397 (8th Cir. 1987) and Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 139 F.R.D. 609 (E.D. Pa. 1991). Chief Justice Davis noted that both the Simon and Rhone-Poulenc decisions agree that reserve information based on attorney input are protected by the opinion work product doctrine but disagree as to the protection afforded to reserve information compiled by non-lawyers. Id. at 364. With regard to non-lawyer generated reserves, Simon takes the position that such information is not protected while Rhone-Poulenc takes the opposite view. Id.

Chief Justice Davis stated that the proper focus for reconciling the positions taken by Simon and Rhone-Poulenc in this regard turns on whether the reserve information is generated in anticipation of litigation. Id. at 364-365. Chief Justice Davis explained that to the extent that the reserves are not established in anticipation of specific litigation – but are set as a routine business practice – Simon “is correct in holding that the opinion work product rule does not shield the information.” Id. However, if the reserve information is established in anticipation of specific litigation, the Rhone-Poulenc approach protects the information from disclosure through the application of the opinion work product rule:

The reasoning, as was discussed in Rhone-Poulenc in context of the risk management documents, is that Rule 26(b)(3) expressly states that the opinion work product rule applies to ‘the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.’ (Emphasis added). Rule 26(b)(3) states that examples of other representatives ‘include[e] the party’s attorney, consultant, surety, indemnitor, insurer, or agent[.]’ See J.C. Assocs. v. Fidelity & Guar. Ins. Co., No. Civ. A. 01-2437 RJLJM, 2003 WL 1889015, *2 (D.D.C.) (‘[I]t would certainly seem that reserve calculations by claims adjusters qualify as work product under Fed. R. Civ. P. 26(b)(3). As that rule requires, they are prepared by the insured’s agent and their *raison d’etre* is the existence of litigation against the insured or its anticipation.’).

Id. at 365.

Here, Erie's reserves are set by Erie's claims representatives and embody the mental impressions of those representatives concerning issues of coverage, liability and damages with respect to the specific claim. (Exh. D at 91-93.) In addition, Erie's reserving is case specific and takes into account the specific information received concerning the individual claimant. (Id. at 94.) Thus, the reserves are prepared in anticipation of specific litigation and are protected from discovery.

The United States District Court for the Northern District of West Virginia has recently applied the rationale set forth in Justice Davis' concurring opinion in Mazzone in affirming a magistrate judge's finding that an insurer's reserve information constituted protected opinion work product under Rule 26(b)(3). Nicholas v. Bituminous Cas. Corp., 235 F.R.D. 325 (N.D.W.Va. 2006).

The plaintiffs in Nicholas initiated a third party bad faith action against Bituminous arising out of Bituminous' handling of their claims after the liability of Bituminous' insured became reasonably clear in relation to a motor vehicle accident. Id. The magistrate judge relied on Mordesovitch v. Westfield Ins. Co., 244 F. Supp.2d 636 (S.D.W.Va. 2003) for guidance in determining whether a document was prepared in anticipation of litigation by reference to "the nature of the requested documents, the reason the documents were prepared, the relationship between the preparer of the document and the party seeking protection from discovery, the relationship between the litigating parties, and any other facts relevant to the issue." Id. In affirming the magistrate judge's finding that Bituminous' reserve information was protected opinion work product prepared in anticipation of litigation, the Nicholas court ruled as follows:

From his review of the documents withheld by Bituminous in this case, Magistrate Judge Kaull concluded that the plaintiffs had retained an attorney shortly after the underlying motor vehicle accident who then had contacted Bituminous. Thus, Bituminous had been on notice early in the case that litigation was reasonably foreseeable; its loss reserve information, therefore, had been prepared 'in anticipation of litigation.' Magistrate Judge Kaull further determined that the loss reserves of Bituminous contained the mental impressions, conclusions and opinions that were entitled to greater protection as opinion work-product.

Once Bituminous had notice of potential litigation, it viewed the Nicholases as plaintiffs, and evaluated not only the substance of their claims but also the potential financial consequences to the company resulting from a lawsuit. Therefore, Bituminous' primary motivating purpose for setting the loss reserves went beyond its ordinary course of investigating and handling claims and was a financial evaluation of the claim from the standpoint of pending or anticipated litigation.

Id.

Concerning the protection afforded to Bituminous' reserves established after the institution of litigation, the Nicholas court further stated:

The fact that Bituminous continued to set reserves after the plaintiffs filed their complaint does not change the quality of the reserve information that requires work product protection. [Rule] 26(b)(3) protects documents that are 'prepared in anticipation of litigation or trial.'

Id. (emphasis in original).

As in Nicholas, the Plaintiff here retained an attorney shortly after the accident who then contacted Erie. As in Nicholas, Erie was on notice early in the case that litigation was reasonably foreseeable. The instant third-party bad faith action relates to Plaintiff's alleged injuries arising out of a motor vehicle accident involving Plaintiff and Erie's insured on October 19, 2000. On October 25, 2000 – within one week of the accident – Plaintiff notified Erie of her

intention to obtain an attorney in contemplation of litigation against Erie's insured. (Exh. E, ERIE 162.) Erie received the letter of representation within a month of the accident on November 17, 2000. (Exh. F, ERIE 687; 158-159). Just as in Nicholas, the reserves set by Erie with respect to Plaintiff's underlying bodily injury claim were prepared in anticipation of litigation upon the notification that Plaintiff had obtained an attorney. (Exh. G, Affidavit of Sandra Barker at ¶¶ 6-8.) When Plaintiff provided Erie with a courtesy copy of the Complaint on January 31, 2002 – and when Erie's insured was served with the Complaint on February 7, 2002 – the reserves established thereafter were in the course of pending litigation and in anticipation of trial. (Exh. H, ERIE 751-753; 57-58.) Specifically, after Erie received the courtesy copy of the Complaint on January 31, 2002, the claim was referred to Erie's litigation department. (Exh. I, ERIE 763.) Shortly thereafter, Erie retained defense counsel to represent the insured with respect to the lawsuit and defense counsel filed an Answer to Plaintiff's Complaint and a Certificate of Service regarding the service of written discovery upon the Plaintiff on February 28, 2002. (Exh. J, ERIE 1081-1082.) As defense counsel provided periodic reports thereafter, the reserves during the pending litigation would reflect privileged attorney-client communications and attorney work product. See, e.g., Privilege Log at pp. 19-23, regarding communications from defense counsel to Erie. (Exh. A.)

Consequently, the requested reserve information constitutes opinion work product prepared within the context of anticipated or existing litigation and is therefore protected from discovery pursuant to Rule 26(b)(3).

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C. Plaintiff Cannot Demonstrate the “Very Rare and Extraordinary Circumstances” Necessary to Overcome the Opinion Work Product Protection Afforded to the Reserve Information.

In granting the Plaintiff’s Renewed Motion to Compel, the trial court suggested that if the reserve information is protected work product, Plaintiff has a substantial need for the reserve information which may overcome the protection afforded by the work product privilege pursuant to Rule 26(b)(3). In suggesting that the Plaintiff need only demonstrate a “substantial need” to obtain the otherwise protected reserve information, the trial court misapprehended the burden that a party must satisfy in order to discover protected opinion work product.

As discussed *supra*, this Court has explained that “‘Rule 26(b)(3) of the West Virginia Rules of Civil Procedure makes a distinction between factual and opinion work product with regard to the level of necessity that has to be shown to obtain their discovery.’” United Hosp. Ctr. v. Bedell, 484 S.E.2d 199 (W.Va. 1997) (quoting *Syl. Pt. 7, In re Markle*, 328 S.E.2d 157 (W.Va. 1984)). As discussed above, Erie’s reserve information constitutes opinion work product protected from discovery pursuant to Rule 26(b)(3). This Court has explained that in order for a party to overcome the protection afforded to such opinion work product, the party must establish the presence of “very rare and extraordinary circumstances”:

Indeed, as we indicated above, fact work product, ordinarily, may be discovered upon a showing of ‘substantial need’ and ‘undue hardship to obtain the substantial equivalent by other means.’ W. Va. R. Civ. P. 26(b)(3). We further indicated that opinion work product however is discoverable only where ‘very rare and extraordinary circumstances’ are present.

Bedell, *supra* (citation omitted); see also Chaparro v. Wilkes, 438 S.E.2d 575 (W.Va. 1993) (“Where opinion work product is involved, the showing required to obtain discovery is even

stronger because the rule states that ‘the court shall protect against disclosure of mental impressions, conclusions, opinions or legal theories.’”).

The instant third-party bad faith action relates to Erie’s evaluation and handling of Plaintiff’s underlying bodily injury claim against Erie’s insured. Plaintiff has access to the information pertaining to Erie’s evaluation and handling of the underlying claim through Erie’s production of its claim file and through depositions of those Erie representatives involved in the evaluation and handling of the underlying claim. As such, Plaintiff knows what factual information Erie had available to it with respect to the underlying claim and when Erie had it. Erie’s reserves shed no additional light on this issue.

As Plaintiff already has access to the information pertinent to the third-party bad faith claim, Plaintiff cannot satisfy the burden of demonstrating “very rare and extraordinary circumstances” so as to overcome the protection afforded to the reserves by the opinion work product privilege.

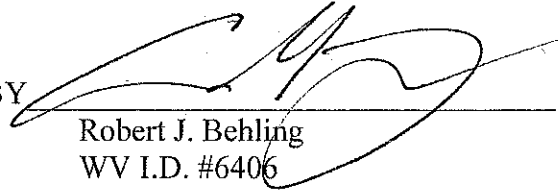
IV. CONCLUSION

For the foregoing reasons, Petitioner, Erie Insurance Property & Casualty Company, respectfully requests that the Petition for Writ of Prohibition be granted.

Respectfully submitted,

DAPPER, BALDASARE, BENSON,
BEHLING & KANE, P.C.

BY



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WV I.D. #6406

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Company)*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, ex rel. Erie
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Petitioner/Defendant Below, Docket No.:

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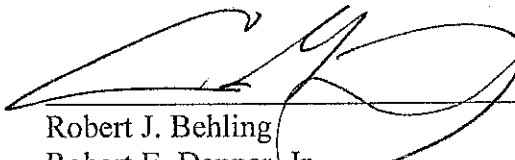
The Honorable James P. Mazzone, Judge
for the Circuit Court of Ohio County and
Elizabeth Murfitt,

Respondents.

VERIFICATION

Commonwealth of Pennsylvania
County of Allegheny

The undersigned being first duly sworn, states that he has read the foregoing Petition for Writ of Prohibition and that the factual representations contained therein are true except insofar as they are stated to be upon information and belief, and that to the extent that they are stated to be upon information and belief, he believes them to be true.


Robert J. Behling
Robert E. Dapper, Jr.
Christopher M. Jacobs

SWORN TO and subscribed before
me this 9th day of August, 2006.


Notary Public

Notarial Seal
Nancy M. Decker-Melaney, Notary Public
City Of Pittsburgh, Allegheny County
My Commission Expires August 5, 2006
Member, Pennsylvania Association Of Notaries

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, ex rel. Erie
Insurance Property & Casualty Company,

Petitioner/Defendant Below, Docket No.:

vs.

The Honorable James P. Mazzone, Judge
for the Circuit Court of Ohio County and
Elizabeth Murfitt,


Respondents.

**MEMORANDUM OF PERSONS UPON WHOM RULE
TO SHOW CAUSE SHOULD BE SERVED**

Comes now, Petitioner, Erie Insurance Property & Casualty Company, in support of its
Petition for Writ of Prohibition and pursuant to Rule 14(a) of the West Virginia Rules of
Appellate Procedure submits this list of names and addresses upon whom the Rule to Show
Cause should be served, if granted:

The Honorable James P. Mazzone, Judge
Ohio County Courthouse
1500 Chapline Street
City/County Building
Wheeling, WV 26003

James G. Bordas, III, Esquire
Bordas & Bordas, PLLC
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Robert J. Behling
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Christopher M. Jacobs